FEDERATION REPORTS

CHENG KAM PENG v. PUBLIC PROSECUTOR.

[Court of Appeal (Willan, C.J., Taylor and Spenser-Wilkinson, JJ.) July 1, 1950]

[F.M. — Criminal Appeal No. 34 of 1950]

Emergency Regulations, Regulation 4(1) — Defence of the accused not put to assessors — Effect of.

In this case the appellant at the trial made a statement in which he admitted carrying a revolver and two grenades, but stated that they were forced upon him; although he did not say by whom or under what circumstances they were forced upon him. This raised the defence of duress under section 94 of the Penal Code. But the learned trial Judge did not put this defence in his summing-up to the assessors.

Held, that one of the cardinal principles of a summing-up is that the defence must be put to the assessors. It is not for the Judge to decide whether the defence, in his opinion, is so worthless that it need not be put to the assessors. The defence, whatever its value, must always be put to the assessors, and there are many cases in which neglect to put the defence adequately to the jury has resulted in the conviction being quashed.

Case referred to :—

(1) Rex v. Mills 25 Cr. App. R. 138.

CRIMINAL APPEAL from conviction and sentence by Hill, J.

Dr. H. Y. Teh for the appellant.

N. L. Cohen (Federal Counsel) for the respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — In this case the appellant was convicted before Hill J. and two assessors on two charges under Regulation 4(1) of the Emergency Regulations, 1948, first for carrying a .38 revolver, and secondly, for carrying two hand-grenades at the same time.

The evidence for the prosecution established beyond all doubt that the appellant was caught red-handed with the revolver in his hip-pocket; one grenade in a pouch of the belt he was wearing; and the other grenade in his hand.

At the trial the appellant made a statement from the dock in which he admitted carrying a revolver and the two grenades, but stated that they were forced upon him; by whom and under what circumstances he did not say. This, for what it is worth, was a defence of duress under section 94 of the Penal Code, which was fore-shadowed by the cross-examination of certain prosecution witnesses.

In his summing-up the learned trial Judge neglected to observe one of the cardinal principles of a summing-up, namely that the defence must be put to the assessors. It is not for the Judge to decide whether the defence, in his opinion, is so worthless that it need not be put to the assessors. The defence, whatever its value, must always be put to the assessors, and there are many cases in which neglect to put the defence adequately to a jury has resulted in the Court of Criminal Appeal in England quashing the conviction — see for example *R. v. Mills*[1].

From a careful perusal of the record we are left in no doubt that reasonable assessors could not have formed the opinion that the appellant was not guilty, even if this defence of duress had been put to them, and with this view counsel for the appellant agreed.

For that reason we applied the proviso to section 29(1) of the Courts Ordinance, 1948, and dismissed this appeal.

We wish to add that in a glaring omission such as this in the summing-up, we would have expected counsel for the accused at the trial to have pointed it out to the learned trial Judge, so that he could have dealt with the defence before the assessors retired. Since counsel for the accused did not take any action, we think that the prosecution would have been well advised to do so.

Appeal dismissed.

THE MUNICIPALITY OF KUALA LUMPUR
v.
THE SOLICITORS FOR THE HONGKONG AND SHANGHAI BANKING CORPORATION.

[Court of Appeal (Willan, C.J., Pretheroe and Taylor JJ.) July 6, 1950]

[F.M. — Civil Appeal No. 6 of 1950]

Costs — Advocates and Solicitors Ordinance — "Scale of Charges" — Difference between Schedules III and IV.

In this case by a deed the Municipality of Kuala Lumpur created a debenture in favour of the Hongkong and Shanghai Banking Corporation to secure a proposed overdraft. The deed contains two main clauses; the first sets out the terms agreed upon with detailed provisions as to calculation of interest; the second, after referring to the statutory powers of the Municipality to hold property and levy rates, "charges with the payments mentioned in clause 1 all the real and personal property and the revenues of the Municipality, present and future, by way of floating security." This debenture was prepared by the solicitors for the bank but the costs are ultimately payable by the Municipality. The bank's solicitors drew up their bill of costs as follows:—

"To our professional charges attending conferring and advising as to a Debenture for $2,000,000/- to be executed in your favour by the Kuala Lumpur Municipality and taking instructions to prepare Debenture. Drawing and preparing draft Debenture attending you going into same and attendance on solicitors for the Municipality and all other attendances, correspondence etc. ... $4,827.40

Scale fee	...	...	$6,435.40
Less 25%	...	...	$1,608.00
			$4,827.40 "

Held, that this debenture is not a conveyance and as Part I of Schedule III is confined to sales, purchases and charges, the bill of costs in relation to this debenture comes under Schedule IV of the Advocates and Solicitors Ordinance, 1947.

Appeal allowed.

Case referred to :—

(1) *Haji Abdul Rahman v. Hassan* 1 F.M.S.L.R. 291 at pp. 296 *et seq.*

CIVIL APPEAL.

E. D. Shearn and *R. Ramani* for the appellant.

C. Mills for the respondents.

The facts in this case sufficiently appear from the judgment of Taylor, J.

Willan, C. J. : — The facts in this case are set out in the judgment of Taylor J.

The bill of costs in question was taxed by the Registrar, Supreme Court, under the item in Schedule III of the Advocates and Solicitors Ordinance, 1947, as amended by the Advocates and Solicitors (Amendment) Ordinance, 1947, which reads :—

"Purchaser's or chargee's solicitor for investigating title and preparing and completing transfer or charge (including perusal and completion of contract, if any) —

(a) Where the property is situate in the States or any of them.

(b) Where the property is situate in the Settlements or either of them".

The point in issue is whether that item refers only to land, or whether it includes all kinds of property — moveable and immoveable.

In my view the words "for investigating title" in that item clearly indicate that it deals with land and land only.

The document in this case is a Debenture, and in the bill of costs prepared by the Bank's solicitors it is described as a Debenture and nothing more.

Although in that document it is stated that the Municipality "charges with the payments mentioned in clause 1 hereof all its real and personal property .... by way of floating security", the use of the words "charges" does not make the document in question a charge against land. If the Municipality had possessed any land and had wished to charge it to the Bank, another document — namely a memorandum of charge under the Land Code (Cap. 138) would be necessary, and that memorandum of charge would have been registered against the land. If that had been the position that memorandum of charge would come under the item in Schedule III of the Advocates and Solicitors Ordinance, 1947, set out above.

For these reasons I have no double that the bill of costs in relation to this Debenture comes under Schedule IV of the Advocates and Solicitors Ordinance, 1947, and accordingly I would allow this appeal.

Pretheroe, J. : — I have had the advantage of perusing the judgment of Taylor J. which sets out the relevant facts. I am in agreement with that judgment, but as we are taking a view different from that of the learned Judge who heard the first appeal, I will briefly express my own view.

The debenture in this case is in a form common to many debentures in that it first sets out the terms agreed upon by the parties and then proceeds to "charge" certain assets of the Municipality by way of floating security. Although the word "charge" is used, no charge in the sense that word is used in Part X of the Land Code is in fact created; another document must be executed and registered to create the charge. It is not until this additional document has been registered that the debenture-holder becomes also the chargee. The item of Schedule III under which the bill has been taxed is applicable to the "chargee's solicitor" which, as I have already stated, the respondents were not.

I have only considered the effect of the use of the word "charged" in relation to land because, from the wording of the item in Schedule III and, in particular, the reference therein to investigating title, that item only relates to documents transferring or charging land.

There is no item in Schedule III which covers the work performed by the respondents in preparing this debenture so that it must be taxed under Schedule IV which is applicable to "work not referred to in Schedule III".

Taylor, J. : — By a deed dated 22nd August, 1949, the Municipality of Kuala Lumpur created a Debenture in favour of the Hongkong and Shanghai Banking Corporation to secure a proposed overdraft. The deed contains two main clauses; the first sets out the terms agreed upon with detailed provisions as to calculation of interests; the second, after referring to the statutory powers of the Municipality to hold property and levy rates, "charges with the payments

mentioned in clause 1 all the real and personal property and the revenues of the Municipality, present and future, by way of floating security." This debenture was prepared by the solicitors for the Bank but the costs are ultimately payable by the Municipality.

The Bank's solicitors drew up their bill of costs as follows :—

"To our professional charges attending conferring and advising as to a Debenture for $2,000,000/- to be executed in your favour by the Kuala Lumupr Municipality and taking instructions to prepare Debenture. Drawing and preparing draft Debenture attending you going into same and attendance on Solicitors for the Municipality and all other attendances, correspondence etc. ... $4,827.40

Scale fee	$6,435.40	
Less 25%	$1,608.00	
	$4,827.40	"

The scale fee was calculated under Schedule III of the Advocates and Solicitors Ordinance, 1947. The Municipality contend that this scale does not apply and that the costs ought to be taxed under Schedule IV. The solicitors petitioned for taxation and after hearing arguments the Registrar held that the bill was taxable under Schedule III and on appeal to a Judge this decision was affirmed. The Municipality now appeal to this Court and the sole question to be decided is whether Schedule III or Schedule IV applies.

Schedule III is headed : — "Scale of charges in sales, purchases and charges" and the relevant item reads :—

"Purchaser's or chargee's Solicitor for investigating title and preparing and completing transfer or charge (including perusal and completion of contract if any)."

Schedule IV is headed :—

"Scale of charges for work not referred to in Schedule III", and the sub-heading reads :—

"Drawing Deeds, Wills and other Documents".

Clearly, Schedule III is a special schedule, limited in its scope to the particular transactions specified, and Schedule IV is a general sschedule covering all the other business described in section 71.

Part I of Schedule III is confined to sales, purchases and charges; in this context the word "charge" means a specific formal charge. This is emphasised by its association with "transfer" and with investigation of title in the item under discussion.

Also, in the corresponding provision of the former Enactment of the Malay States the word "charge" had this limited meaning. Sub-section (2) of section 72 of the Ordinance, by which its meaning was extended to include mortgage, was added after Penang and Malacca joined the Federation and applies only to those Settlements. There are no mortgages in the Malay States.

I think this construction of the Statute is supported by the judgment of the Judicial Committee of the Privy Council in *Haji Abdul Rahman v. Hassan*[1], though the Schedule considered there was a different one.

Schedule IV relates to wills and other instruments. Some of these, marriage settlements for instance, often contain charging clauses but that does not make them charges. They are deeds of settlement and fall within Schedule IV.

The Kuala Lumpur Municipality is a new creation and at present owns no land or immovable property whatever.

This debenture is not a conveyance. It does not charge any land. Apart from the fact that the Municipality has no chargeable land, even if there were any, this instrument would not charge it, for two reasons : — first because it is not registrable and, secondly, because — even in a country where the Torrens law is not in operation — such an instrument does not prevent the corporation from selling its land, 5 *Hailsham* pp. 481, 482 and the cases there cited.

The word "charge" has many meanings and the fundamental error in the contention of the solicitors is that they have used the word in two senses but argued as though they had used it in one sense only. In effect they say, "This is a charge, therefore we are the chargee's solicitors." This is *non-sequitur*. The debenture may create, as it purports to do, a charge — namely a floating charge — but it does not make the Bank chargees; they are debenture holders. A debenture need not contain a charge. Where it is desired to make land a security for debenture holders it is usual to create a floating charge (similar to the one in this case) over the other assets and to support it by a specific charge or mortgage of the land. In such a case the supporting instrument might well fall within Schedule III because investigation of title would be necessary.

It was suggested that this case had actually involved such investigation with reference to the powers of the Municipality to create charges. This is an error due to confusion of two distinct things — namely investigation of title, which may or may not confer a power to convey, and investigation of capacity to convey, which both natural and corporate persons may or may not possess, irrespective of the title to their property.

The unsoundness of this part of the argument is apparent from the wording of the bill. The work which the solicitors have done is clearly specified as advising on a proposed debenture and then drawing it. There is no mention of investigation of title for the best of all possible reasons. None was done. The word "charge" does not occur, still less the word "chargee". This work is assessable under Schedule IV and the appeal must be allowed.

Appeal allowed.

OOI PHEE CHENG v. KOK YOON SAN.

[Orig. Civ. Juris. (Taylor, J.) May 26, 1950]

[Kuala Lumpur — Civil Suit No. 199 of 1949]

Contract — Loan of money during Japanese occupation expressed to be payable in "British or Allied Currency" — Admissibility of evidence to explain meaning of words — Evidence Ordinance, s. 98 — Debtor and Creditor (Occupation Period) Ordinance, 1948.

In this case it appeared that during the Japanese occupation one Lee Tuck Onn (since deceased) borrowed money from the plaintiff and signed I.O.U.s wherein he agreed to repay "in British or Allied Currency". The plaintiff brought an action against the executor of Lee Tuck Onn (deceased) to claim payment of the moneys lent.

Held, (1) that evidence was admissible under section 98 of the Evidence Ordinance to explain the meaning of the words used; (2) that on the facts the agreement in this case was to pay the money in the equivalent of the British or Allied Currency in use after the liberation and therefore there ought to be an enquiry to ascertain the amount repayable.

Case referred to:—

(1) *Scammell v. Ouston* (1941) A.C. at pp. 268 and 269.

CIVIL SUIT.

H. E. P. Powell for the plaintiff.

S. N. Veerasamy and *H. T. Ong* for the defendant.

Cur. Adv. Vult.

Taylor, J. : — This case is somewhat anomalous.

The plaintiff is a printer and stationer and the defendant is the executor of one Lee Tuck Onn, a man of considerable independent means who developed leprosy and entered the Leper Settlement at Sungei Buloh for treatment sometime before the Japanese invasion. At first Lee was able to receive substantial sums from the income of his property but as the enemy occupation dragged on these remittances dried up. Sometime about the end of 1944 Lee became connected with the Anti-Japanese Resistance Movement and lived in the jungle near Sungei Buloh but he continued to come into the Settlement, unostentatiously, to receive medical treatment. He was on friendly terms with Dr. Che Lah, who was at that period the Superintendent of the Settlement and who was also a friend of the plaintiff.

Sometime about May 1945 Lee was in pressing need of funds and asked Dr. Che Lah to raise a loan for him, to be repaid, after Liberation, in British or Allied currency.

At that time the local population were all living more or less under the shadow of the Japanese Gestapo and had only irregular and surreptitious access to world news but they knew that the war was developing favourably to the Allies and they foresaw Liberation within a year or less though they could not possibly foresee whether Malaya would be relieved by British forces or by a Joint Allied force. Still less could they foresee what the new financial arrangements would be. There might well be a new Joint Allied Currency if several of the enemy-occupied countries were recovered simultaneously or the Indian Rupee might be introduced in order to provide currency for immediate needs. Anything might happen. Only one thing in this field was certain. The Japanese "printing press" currency was depreciating more and more rapidly, and when the country was liberated it would become valueless for all practical purposes, whether it were legally proscribed or not. It was in these circumstances that Dr. Che Lah, acting in a friendly way as agent for both parties, asked the plaintiff to make an advance to Lee. The plaintiff handed to the Doctor $20,000 in Japanese notes and a blank printed form of I.O.U. The doctor handed these to Lee who signed the I.O.U. for $20,000. He also wrote on the face of the document the words: — "In British or Allied Currency" and signed them separately.

Two or three weeks later a loan of $30,000 was made in the same way, except that on this occasion the plaintiff met Lee himself in the Leper Settlement. The I.O.U. was in exactly the same form.

Both I.O.Us. were antedated to 1944. This was done by Lee because he thought there might be additional danger to the plaintiff if by mischance the I.O.U. fell into the hands of the Japanese and they thus became aware that the plaintiff had had dealings with him after the date when he, Lee, had withdrawn to the jungle. From the Japanese point of view Lee was the equivalent of a bandit supply agent in the present emergency and he was "wanted". This precaution was almost useless because if the Japanese had even